

No. 386.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

Northern Pacific Railroad Company,

Plaintiff in Error,

vs.

Maria Amacker, J. J. Amacker (her husband), G. S. Howell, G. Gotthart, W. H. Little, A. J. Steele, F. H. Ringe, J. Blank, J. Jordan, H. B. Reed and Geo. Dibert,

Defendants in Error.

TRANSCRIPT OF RECORD.

Error to the United States Circuit Court, for the
District of Montana.

AUG 25 1897

FILED

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In the Circuit Court of the United States for the Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD
COMPANY.

Plaintiff,

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband, GEORGE S. HOWELL, GEORGE GOTTHARDT, WALTER H. LITTLE, ALEXANDER J. STEELE, FRANK H. PINGS, JOHN BLANK, JOSEPH JORDAN, HERBERT B. REED, and GEORGE DIBERT,

Defendants.

Be it remembered, that on the 8th day of May, 1891, the plaintiff herein filed its complaint, which is in the words and figures as follows, to-wit:

*In the Circuit Court of the United States for the Ninth
Circuit, District of Montana.*

NORTHERN PACIFIC RAILROAD
COMPANY.

Plaintiff,

vs.

MARIA AMACKER, JOHN J. AMAC-
KER, Her Husband, GEORGE S.
HOWELL, GEORGE GOTTHARDT,
WALTER H. LITTLE, ALEXAN-
DER J. STEELE, FRANK H.
PINGS, JOHN BLANK, JOSEPH
JORDAN, HERBERT B. REED, and
GEORGE DIBERT,

Defendants.

Complaint.

For cause of action against said defendants plaintiff complains and alleges:

I. That is it a corporation, organized and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast, by the northern

route," and those acts and joint resolutions supplementary thereto and amendatory thereof.

II. That it is and was, at all the times hereinafter mentioned, the owner of, and entitled to the possession of the south half of the northwest quarter of section seventeen (17), township ten (10) north, of range three (3) west, of the principal meridian of Montana.

III. That on the day of 1890, while the plaintiff was seized in fee simple of said land, the said defendants, without right or title, entered into possession thereof, against the will and without the consent of the plaintiff and ousted and ejected plaintiff therefrom, and now unlawfully withhold possession thereof from plaintiff.

IV. That said land is of the value of over ten thousand dollars.

Wherefore plaintiff prays judgment against said defendants for the recovery of possession of said land, and for its costs and disbursements herein.

CULLEN, SANDERS AND SHELTON
F. M. DUDLEY,

Attys. for plaintiff.

State of Montana, }
County of Lewis and Clarke, } ss

F. M. Dudley, being duly sworn says: That he is an officer of the above-named plaintiff, to-wit its general land attorney; that he has read the foregoing complaint

and knows the contents thereof, and that the same is true according to his best knowledge, information and belief.

F. M. DUDLEY,

Subscribed and sworn to before me this 6th day of May,
1891.

[Seal]

CHAS. H. COOPER,

Notary Public.

[Endorsed]: Title of court and cause. Complaint.
Filed May 8, 1891. Geo. W. Sproule, Clerk.

And on the said 8th day of May, 1891, a summons was duly issued herein which said summons as duly returned is in the words and figures as follows, to-wit:

UNITE DSTATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD
COMPANY.

Plaintiff,

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband, GEORGE S. HOWELL, GEORGE GOTTHARDT, WALTER H. LITTLE, ALEXANDER J. STEELE, FRANK H. PINGS, JOHN BLANK, JOSEPH JORDAN, HERBERT B. REED, and GEORGE DIBERT

Defendants.

Summons.

Action brought in the said Circuit Court, and the Complaint filed in the office of the Clerk of said Circuit Court, in the City of Helena, County of Lewis and Clarke.

The President of the United' States of America, Greeting,
 to Maria Amacker, John J. Amacker, her husband,
 George S. Howell, George Gotthardt, Walter H. Little,
 Alexander J. Steele, Frank H. Pings, John Blank,
 Joseph Jordan, Herbert B. Reed, and George Dibert,
 Defendants.

You are hereby required to appear in an action brought against you by the above named plaintiff, in the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, and to file your plea, answer or demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said Court, in the city of Helena, and county of Lewis and Clarke, within 20 days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover from you said defendants the possession of that certain piece, parcel or tract of land described as follows: the south half of the northwest quarter of section seventeen (17), township ten (10) north, of range three (3) west, of the principal meridian of Montana; which you said defendants on the day of 1890, while plaintiff was seized in fee simple, ousted and ejected plaintiff therefrom and now unlawfully withhold possession thereof from plaintiff, and for costs and disbursements herein all of which is more fully set out in the original complaint on file herein to which reference is hereby made, and if you fail to appear and plead, answer or demur, as herein required, your

default will be entered and the plaintiff will apply to the court for the relief demanded in the complaint herein.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 8th day of May, in the year of our Lord one thousand eight hundred and ninety-one and of our Independence the 115.

[Seal]

GEORGE W. SPROULE,
Clerk.

By _____,
Deputy Clerk.

United States Marshal's office, }
District of Montana. }

I hereby certify, that I received the within writ on the 8th day of May, 1891 and personally served the same on the dates named days of May, 1891, by delivering to, and leaving with Maria Amacker and John J. Amacker (16), Frank H. Pings (26), A. J. Steele, W. H. Little, Geo. S. Howell, Geo. Dibert, J. Jordan, Geo. Gotthardt, John Blank, (12th). Said defendant named therein personally, at the county of Lewis and Clarke in said district, a certified copy thereof, together with a copy of the complaint, certified to by clerk of said Circuit Court attached thereto.

W. F. FURAY,
U. S. Marshal.

By Geo. Leekley,
Deputy.

Helena, May, 27th, 189 .

[Endorsed]: Filed June 6th, 1891. Geo. W. Sproule, Clerk.

And thereafter, to-wit on the 20th day of June, 1891, the answer of certain defendants was filed herein, which said answer is in the words and figures as follows ,to-wit:

In the Circuit Court of the United States, for the Ninth Circuit, District of Montana:

NORTHERN PACIFIC RAILROAD
COMPANY.

Plaintiff,

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband, GEORGE S. HOWELL, GEORGE GOTTHARDT, WALTER H. LITTLE, ALEXANDER J. STEELE, FRANK H. PINGS, JOHN BLANK, JOSEPH JORDAN, HERBERT B. REED, and GEORGE DIBERT,

Defendants.

Answer of Defendants Geo. S. Howell, et al.

The defendants George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed, and George Dibert, who appear by Thos. C. Bach their attorney, for answer to the complaint herein—

1st. Deny that the plaintiff is or ever was the owner of or entitled to the possession of the south half of the north-west quarter of section 17, township 10 north, of range 3 west, of the principal meridian of Montana, or any part thereof.

2nd. Denies that defendants or any of them ever or at all ousted or ejected plaintiff from said premises or any thereof, or that they or any of them unlawfully withheld the possession thereof or any thereof from such plaintiff.

Wherefore defendants pray judgment against the plaintiff, that the complaint of plaintiff be dismissed, and that they recover their costs in this case expended.

THOS. C. BACH,
Attorney for defendants named.

State of Montana, }
County of Lewis and Clarke. } ss.

Walter H. Little, being duly sworn, says that he is one of the defendants answering herein, and that he and they are united in their interests and pleading in this case, and that he is acquainted with the facts of this case; that he has read the foregoing pleading and knows the contents thereof, and that the facts therein stated are true to his own knowledge, except as to those matters which are therein stated on his information and belief, and as those matters that he believes it to be true.

WALTER H. LITTLE,

Subscribed and sworn to' before me this 20th day of June, 1891.

THOS. C. BACH,

Notary Public in and for Lewis and Clarke county, State of Montana.

I do hereby certify that in my opinion the foregoing answer is well founded in law.

THOS. C. BACH,

Attorney for defendants.

Service of the above answer this 20th day of June, 1891 admitted.

CULLEN, SANDERS and SHELTON,

Attys. for plff.

[Endorsed]: Title of Court and Cause. Answer. Filed June 20, 1891, Geo. W. Sproule, clerk. By W. J. Kennedy, Deputy Clerk.

And thereafter, to-wit on the 18th day of March, 1892, the answer of defendants Maria Amacker and John Amacker, her husband was filed herein which said answer is in the words and figures as follows, to-wit:

In the Circuit Court of the United States for the Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD
COMPANY.

Plaintiff,

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband, GEORGE S. HOWELL, GEORGE GOTTHARDT, WALTER H. LITTLE, ALEXANDER J. STEELE, FRANK H. PINGS, JOHN BLANK, JOSEPH JORDAN, HERBERT B. REED, and GEORGE DIBERT,

Defendants.

Answer of Defendants Marla and J. J. Amacker.

Separate answer of Maria Amacker and John J. Amacker her husband.

And now comes Maria Amacker and John J. Amacker, two of the defendants above named, and for their separate answer to the complaint of the plaintiff.

First. Deny that the said plaintiff is, or was at all the times, or any of the time, or ever the owner of or entitled to the possession of the south half of the northwest quarter of section number seventeen (17), in township ten (10) north, of range three (3) west, of the principal meridian of Montana, or that plaintiff is, or ever was the owner of or entitled to the possession of any part or portion of said premises.

Second. Deny that the plaintiff was at the time mentioned in said complaint seized in fee simple of said land or had any interest therein, and deny that these defendants or either of them without right or title entered into the possession thereof, and deny that these defendants, or either of them, ousted or ejected the plaintiff from said premises, or any part thereof, and deny that these defendants, or either of them, now unlawfully withhold possession of said premises from the plaintiff.

Wherefore, having fully answered said complaint, these defendants pray to be discharged with their costs in this behalf expended.

MASSENA BULLARD,
Attorney for answering defendants.

State of Montana,)
County of Lewis and Clarke.) ss.

Maria Amacker being duly sworn says: That she is one of the answering defendants named in the foregoing answer, and acquainted with the facts therein stated; that she has read the foregoing answer and knows the contents thereof and that the same is true of her own knowledge except as to those matters which are therein stated upon her information and belief and as to those matters she believes the same to be true.

MARIA AMACKER.

Subscribed and sworn to before me this fifteenth day of March in the year of our Lord, 1892.

J. MILLER SMITH,
Notary Public.

Due and legal service of the within answer accepted this sixteenth day of March A. D. 1892.

CULLEN, SANDERS, and SHELTON,
Attys. for Plff.

[Endorsed]: Title of court and cause. Separate answer of Maria Amacker and John J. Amacker.

And thereafter to wit on the 18th day of December, A. D. 1895, the following agreed statement of facts was duly filed herein in the words and figures as follows, to-wit:

In the United States Circuit Court for the District of Montana.

NORTHERN PACIFIC RAILROAD
COMPANY.

Complainant,

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband, GEORGE S. HOWELL, GEORGE GOTTHARDT, WALTER H. LITTLE, ALEXANDER J. STEELE, FRANK H. PINGS, JOHN BLANK, JOSEPH JORDAN, HERBERT B. REED, and GEORGE DIBERT.

Defendants.

Agreed Statement of Facts.

It is hereby stipulated, and agreed, by and between the parties hereto, that, for the purpose of the trial of this action, the following facts shall be deemed and taken to be true:

I.

That the Northern Pacific Railroad Company is a corporation created, organized, and existing under and by virtue of an act Congress, approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route."

II.

That by the terms of said act, said company was authorized and empowered to lay out, locate, and construct a railroad and telegraph line, with the appurtenances, from a point on Lake Superior, in Minnesota or Wisconsin, thence westerly by the most eligible route, to be determined by said company, within the territory of the United States, on a line north of the 45th degree of latitude, to some point on Puget Sound, with a branch via the valley of the Columbia river, to a point at or near Portland, in the state of Oregon, leaving the main trunk line at the most suitable place not more than three miles from its western terminus.

That by the third section of said act it was provided:

"That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of a railroad and telegraph line to the Pacific coast, and to secure the

safe and speedy transportation of the mails troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims of rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior in alternate sections designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

That by the sixth section of said act of Congress, it was, among other things, enacted and provided as follows:

"That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-

emption before or after they are surveyed, except by said company as provided in this act.”

III.

That said Northern Pacific Railroad Company duly accepted the terms, conditions, and impositions of said act, and signified such acceptance in writing, under the corporate seal of said company; duly executed pursuant to the directions of its board of directors first had and obtained, and within two years after the passage of said act, to-wit, December 29, 1864, severed such acceptance on the President of the United States.

IV.

That February 2, 1870, and March 10, 1870, the board of directors of said railroad company authorized the executive committee to survey and locate the main and branch lines of said railroad.

V.

That afterward to-wit July 8, 1870, the said executive committee of the board of directors of said railroad company, by resolution provided as follows:

“Resolved that the president cause a preliminary location with a map of the main road of the Northern Pacific Railroad company, commencing at Whatcom, on Puget Sound, thence running southerly on the easterly side of the said Sound to Portland, in Oregon, and from the point where the said railroad crosses the Columbia river, and

on the north side thereof and by the valley of the said river to the mouth of Snake river, to be filed in the office of the secretary of the department of the interior at Washington at as early date as practicable. Also to cause a like preliminary location with a map of the main line from the point on the Red river where the said road may cross the said river, running thence to the Missouri river at the point of intersection of the Yellowstone with the Missouri, and thence up the valley of the Yellowstone to a point in the Rocky Mountains, which shall be common to a line to be run either down the valley of the Salmon river or the Clearwater river, and to file the said map with the secretary of the interior at Washington."

VI.

That afterward, to-wit, July 26, 1870, the president of said railroad company transmitted to the secretary of the interior two maps showing the preliminary line of general route of said road, one exhibiting that portion of said road beginning on Lake Superior, at the mouth of the Montreal river, and extending thence to a point on the right bank of the Columbia river, opposite the mouth of Walla Walla river, in Washington; the other that portion extending from the mouth of Walla Walla river, westerly to the terminus on Puget Sound. That the line as shown upon said map was more than forty miles from the south half of the northwest quarter (S. $\frac{1}{2}$ N. W. $\frac{1}{4}$) of section seventeen (17), township ten (10) north, of range three (3) west, P. M. Montana.

That the said maps so transmitted to the secretary of the interior were received by that office on July 30, 1870. That August 4, 1870, and before said maps had been accepted by said secretary, and before any action had been taken with reference thereto, the engineer in chief of said railroad company, Edwin F. Johnston, addressed to the secretary of the interior the following letter:

“Northern Pacific Railroad Company.

Engineer’s Office,

120 Broadway,

New York, Aug. 4th, 1870.

Hon. J. D. Cox, Secretary of the Interior,

Dr. Sir: From information received from my assistants in Montana and Idaho, since my return here from Washington, it is probable the Northern Pacific Railroad Company may wish to vary the location of that portion of their line situated between the mouth of Boulder Creek on Jefferson river in Montana and the Columbia River.

There is reason to fear that the valley of the Salmon river may be found impracticable, in which case the company will be compelled to take the next valley to the north of it,—the Clearwater. The president of our company is absent for some days in Minnesota and I desire you not to take any action on the portion of the route named until he returns or I can communicate with him.

Yours very respectfully,

EDWIN F. JOHNSTON,

Eng. in Chf. N. Pacific R. R.”

That said letter was duly received by the secretary of the interior, and thereafter, to-wit, August 5, 1870, the said secretary replied as follows:

“Department of the Interior,

Washington, D. C. August 5th, 1870.

Sir: I have received your letters of the 2nd and 4th instant—the first relatnig to the legislation as to the main line and branch of the Northern Pacific Railroad and the second stating it may be necessary to change the route of the road in Idaho from the valley of the Salmon river to that of the Clearwater, and asking suspension of action on that portion of the map until you can advise with the president of the company.

In reply, I state that I see no objections to a compli-
ance with your request and action will be accordingly sus-
pended.

Very respectfully,

Your obt. servt.,

J. D. COX,

Secretary.

Edwin F. Johnston, Esq.,

Eng. in Chf. N. P. R. Co.

120 Broadway, New York.”

That thereafter, to wit, August 13, 1870, the said secre-
tary of the interior transmitted said map to the commis-
sioner of the General Land Office, with the following in-
structions:

“Department of the Interior,

Washington, D. C. August 13, 1870.

Sir: I transmit herewith two maps showing the designated route of the Northern Pacific Railroad

You will immediately direct the proper local land officer in the states of Wisconsin and Minnesota to withhold from sale, pre-emption, homestead, and other disposal of the odd-numbered sections not sold, reserved, and to which prior rights have not been attached, within twenty miles on each side of the route, and in like manner direct those officers in Washington Territory to withhold such odd-numbered sections as lie south off the town of Stielacoom. The unsurveyed as well as surveyed lands will be included in the reservation, and you will direct the local officers to give notice accordingly; and as the township plats are received by them, they will make the proper notes of reservation thereon.

The withdrawal will take effect from the receipt of the order at the local office.

Very respectfully your obt. servant,

HON. JOS. S. WILSON,

Commissioner of the General Land Office.”

Afterward, to-wit, in September, October, and November, 1870, the commissioner of the general land office, under the foregoing directions of the secretary of the interior, withdrew from sale or location, pre-emption or homestead entry, all the odd-numbered sections of public land falling within twenty miles of, and coterminous with, that portion of said line extending through the states of Wis-

consin and Minnesota; and within forty miles of that portion of said line extending through the territory of Washington. That no action was then or ever thereafter, taken with reference to that portion of said line extending through the territories of Dakota, Montana and Idaho.

VII.

That thereafter the said Northern Pacific Railroad Company proceeded with the survey and location of the general route of its said railroad, extending from the Red river of the North westward to a point in Washington, on the eastern bank of the Columbia river, where it intersected the line of general route as shown upon the map filed August 13, 1870, and accepted and approved by the secretary of the interior; and having surveyed and located such portion of its said line of general route, it filed a plat thereof, duly approved by the secretary of the interior, in the office of the commissioner of the general land office, on the 21st day of February, 1872.

That thereafter, to-wit, April 22, 1872, the commissioner of the general land office under the direction of the secretary of the interior transmitted to the register and receiver of the United States district land office at Helena, Montana, a plat showing so much of said line of general route as extended through the district of lands for sale at said office at Helena, Montana, and designated thereon the limits including the lands coterminous with, and within forty miles of, said line, and transmitted with said map or diagram, the following:

“Department of the Interior.

General Land Office,

April 22, 1872.

Register & Receiver, Helena, Mont.,

Gentlemen: I transmit herewith a diagram showing the designated route of the Northern Pacific Railroad, under the act of July 2nd, 1864, and by direction of the secretary of the interior you are hereby directed to withhold from sale or location, pre-emption or homestead entry all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of forty miles as designated on this map.

You will also increase in price to \$2.50 per acre the even numbered sections within these limits, and dispose of them at that ratability, and under the pre-emption laws only. No private entry of the same being admissible until these lands have been offered at the increased price.

This order will take effect from the date of its receipt by you, and you are requested to acknowledge without delay the time of its receipt.

Very respectfully,

WILLIS DRUMMOND,

Commissioner.”

That said diagram and order of withdrawal were received at said United States district land office at Helena, and duly filed therein, May 6, 1872. That the land in controversy, to-wit, the south half of the northwest quarter (S. 1-2 N. W. 1-4) of section seventeen (17), township ten

north of range three (3) west, P. M. Montana, was on and within forty miles of said portion of said line as shown upon said diagram so transmitted to the United States district land office at Helena, Montana as aforesaid, and was included within the forty mile limits as designated on said diagram.

VIII.

That thereafter the said Northern Pacific Railroad Company surveyed and definitely located the line of its railroad, extending through said district of lands for sale at Helena, Montana, and July 6, 1882, fixed said definite location by filing a plat thereof, duly approved by the secretary of the interior, in the office of the commissioner of the general land office.

That the said line of definite location so fixed was coterminous with, and within twenty miles of, said land, hereinbefore described. That the plat showing that portion of said line of definite location was duly received and filed in the United States district land office, at Helena, Montana, June, 21, 1883.

IX.

That thereafter said Northern Pacific Railroad Company proceeded with the construction of its said railroad and telegraph line on, over and along its said line as so definitely located, and completed the same opposite to and coterminous with said described land on or about July 1, 1883. That the completion of said railroad and telegraph line having been reported to the President of the

United States, said President thereupon appointed three commissioners to examine the same, and it appearing to said commissioners that said portion of said railroad and telegraph line had been constructed in a good, substantial and workmanlike manner, in all respects as required by said act of Congress, they so reported to the President of the United States, and recommended that said portion of said railroad, being a section more than twenty miles in length, be accepted.

That thereafter, to-wit: on the 1st day of October, 1883, the said President of the United States duly approved the said recommendation, and directed that the patents earned by the construction of said railroad and telegraph line should be issued to said railroad company.

X.

That on July 2, 1864, the said south half of the north west quarter (S. $\frac{1}{2}$ N.W. $\frac{1}{4}$) of said section seventeen, township ten (10) north, of range three (3) west, P. M. Montana, was public land to which the United States had full title, not reserved sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights. That it was then, has been at all times since, and is now, non mineral land; and except as such condition may have been changed by the proceedings herein set forth, said land has been at all times herein mentioned, public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights. That said describ-

ed land has been at all times, and is now, within the district of lands for sale at the United States district land office at Helena, Montana.

XI.

That October 5, 1868, one William M. Scott, then a citizen of the United States over twenty-one years of age filed in the United States district land office at Helena, Montana, his pre-emption declaratory statement, No. 179, under and in conformity with the provisions of the laws of the United States authorizing pre-emption cash entry of the public lands, wherein and whereby he made pre-emption claim to the south half of the northwest quarter (S. $\frac{1}{2}$ N.W. $\frac{1}{4}$) and the north half of the southwest quarter (N. $\frac{1}{2}$ S. W. $\frac{1}{4}$) of said section seventeen (17), township ten north, of range three (3) west, P. M. Montana, alleging settlement as of the same day. That said declaratory statement was accepted and filed in the said United States district land office at Helena, Montana, and was duly and regularly noted on the records thereof. That such declaratory statement and filing is still of record in said land office and has never been canceled, unless cancellation results as a matter of law from the proceedings herein set forth? That said Scott settled upon said land on October 5, 1868, and afterward, to-wit, in the spring of 1869, built a house thereon and moved into it.

XII.

That October 20, 1869, said Scott filed his pre-emption declaratory statement No. 719, amendatory of said declaratory statement No. 179, in said United States district land office at Helena, Montana, wherein and whereby he alleged settlement upon, and asserted claim to, under the pre-emption laws of the United States, the south half of the northwest quarter (S. $\frac{1}{2}$ N. W. $\frac{1}{4}$) and the northeast quarter of the northwest quarter (N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$) of said section seventeen (17), township ten (10) north, of range three (3) west, P. M. Montana.

XIII.

That said Scott continued to reside upon said premises until the fall of 1869, when he moved to the city of Helena, Montana, and continued to live in Helena until the year 1878, when he moved to the city of Butte, Montana. That he never returned to said described land after leaving it in the fall of 1869, and never exercised any act of ownership over the same, and at the said time abandoned the said land.

XIV.

That October 14, 1872, said William M. Scott filed a new amended declaratory statement, No. 2807, under the pre-emption laws of the United States, wherein he alleged settlement upon certain described land, and made claim thereto under the said laws of the United States authoriz-

ing pre-emption cash entry of unoffered lands. That said declaratory statement did not cover or include the said south half of the northwest quarter (S. $\frac{1}{2}$ N. W. $\frac{1}{4}$) of section seventeen (17), township ten (10) north, of range three (3) west, P. M. Montana.

XV.

That May 3, 1872, one William McLean, being then a citizen of the United States over twenty-one years of age and qualified under the law to enter lands under the homestead laws of the United States, duly applied under an act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," and the acts amendatory thereof, to enter the west half of the northwest quarter (W. $\frac{1}{2}$ N. W. $\frac{1}{4}$), the southeast quarter of the northwest quarter (S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$) and the southwest quarter of the northeast quarter (S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$) of section seventeen, township ten (10) north, of range three (3) west P. M. Montana, and was then and there permitted by the register and receiver of said United States district land office at Helena, Montana, to enter said land, under and in accordance with the provisions of said act of Congress; and that thereupon said McLean did make an affidavit as required by section 2290 of the Revised Statutes of the United States, and filed the same with the register and receiver of said land office; and his said entry was then and there noted upon the records of said office; and that the said William McLean in September, 1872, moved on to the said premises a frame dwelling-

house constructed of boards set up and down and covered with a shingle roof, and having a door and window, and put into said house a cook stove and its proper furniture, together with a bed, and from that time until the spring of 1873 spent his nights in said house upon said premises, and in the spring of 1873 he was married to the defendant Maria Amacker and ceased to reside on said premises.

XVI.

That on the first day of December, 1874, the commissioner of the general land office wrote to the register and receiver at Helena, Montana, that the said homestead entry of said McLean was held for cancellation, and for the reason that the same was made subsequent to the time at which the rights of the Northern Pacific Railroad Company attached to the said described land.

XVII.

That July 3, 1879, the register and receiver of the United States district land office at Helena, Montana, transmitted to the commissioner of the general land office the following letter, to-wit:

“United States Land Office,

Helena, Montana, July 3rd, 1879.

Hon. Com. Gen'l. Land Office, Washington, D. C.

Sir: We have the honor to report that June 2nd, 1879, the applicants to the following homestead entries were duly notified, in accordance with your circular of Decem-

ber 20th, 1879, to show cause within thirty days from date of said notice why their entries should not be canceled, and up to this date no action has been taken. No. 819, William McLean W. $\frac{1}{2}$ N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, and S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, sec 17, 10 N., 3 W, made May 3, 1872.

We would respectfully recommend that these homestead entries be canceled.

Very respectfully,

J. H. MOE,
Register.

F. P. STERLING,
Receiver.

That said letter was duly received by said commissioner. That afterward, to-wit, September 11, 1879, said commissioners transmitted to the register and receiver of the United States land office at Helena, Montana, the following letter:

“Sept. 11, 1879.

Register and Receiver, Helena, Montana.

Gentlemen: I am in receipt of your letter of June 4th and July 3d last, stating that the applicants in the following homestead entries were duly notified, in accordance with the circular of Dec. 20, 1873, to show cause why their entries should not be cancelled, and that no action has been taken by them, and recommending the cancellation of said entries, viz: No. 819, made May 3, 1872, by William McLean, W. $\frac{1}{2}$ N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$ E. $\frac{1}{4}$ 17, 10 N. 3 W.

In view of the facts that the above entries were held for cancellation in November and December, 1874, and of the

further facts that the parties have allowed the limitation provided by statute to expire without making final proof as required, and having failed to establish their claims after due notice given, the said entries are hereby cancelled

Advise the parties in interest.

J. M. ARMSTRONG,
Acting Commissioner."

The circular of December 20, 1873, referred to in the above letters, is as follows:

"Circular.

Department of the Interior,
General Land Office,

December 20, 1873.

Gentlemen: In a number of cases, persons who have initiated titles to the public lands under the homestead law have allowed the limitation provided by the statute to expire without making the final proof of settlement and cultivation required by the act.

Therefore, in all such cases as now exist in your district or may hereafter arise, you will notify the parties of their noncompliance with the law, and that thirty days from date of service of notice will be allowed to each of them within which to show cause why their claim shall not be declared forfeited and their entries canceled. At the expiration of that time you will report the reasons given, on, in case of failure, report that fact, so that in either event proper action may be had by this office.

But you will in no case allow the lands embraced in

such claims to be reinstated until you shall have received from this office a formal notice that the original entries have been positively canceled. I append a form of notice which you will be pleased to adopt.

Very respectfully,

WILLIS DRUMMOND,

Commissioner.

Registers and Receivers, United States Land Offices.

Form of Notice.

A B..... (place of residence, or, that being unknown address to the postoffice nearest to the land).

Sir: You are hereby notified that the homestead law requires final proof of settlement and cultivation to be made within two years after the expiration of five years from the date of entry and that in case of your entry No., for dated the, the time fixed by the statute has expired without the requisite proof being filed by you. You will, therefore, within thirty days from the date of service of this notice, show cause before us why your claim shall not be declared forfeited and your entry canceled for noncompliance with the requirements of the law so that the case may be reported to the commissioner of the general land office for proper action.

(Date).

.....
Register.

.....
Receiver.

That the defendant, Maria Amacker (formerly Maria McLean) the widow of said William McLean, has not in her possession, and is unable to produce, a letter or order to said William McLean issued in 1879, or at all, directing him to show cause why his said entry should not be canceled, and has no knowledge that such order was ever received by said William McLean. That the custom of the United States district land office in sending out notice to show cause, under the said circular of December 20, 1873 is to issue the notice on the printed blank. That the said blank form is filled in with the name of the entryman and sent to the proper parties by registered mail, and no copy thereof, is retained in the land office. That after diligent search no copy of the letter claimed to have been sent to said McLean on June 2, 1869, has been found in said United States district land office. That it is not the practice to make an entry of the notice so sent out, further than by the copy of the letter advising the commissioner of the general land office of the transmission of such notice to the entryman. It was also the custom when such notice was sent to receive from the postmaster to whom the letter was delivered a receipt therefor, also a receipt from the person to whom it was sent, which it was the custom to send to the department as evidence that the notice was served; the records of the land office do not show any such receipt.

That until September 11, 1879, there was no cancellation of McLeans homestead entry, but that said homestead entry was canceled at said time in pursuance of the above letter of acting commissioner dated Sept. 11, 1879, and not otherwise.

XVIII.

That said McLean never settled upon or improved said described land.

XIX.

That said William McLean died in August, 1882; and that Maria Amacker (then Maria McLean, widow of deceased) was appointed his executrix, he left a will and testament which was duly admitted to probate by which he devised to said Maria McLean the premises in controversy.

XX.

That March 15, 1883, Maria McLean, widow of said William McLean, as such applied to the said United States district land office at Helena, Montana, to purchase said described land, and to perfect her husband's entry thereof, under the provisions of the act of Congress of June 15, 1880, and section 2291 of the revised statutes of the United States.

XXI.

That the said Northern Pacific Railroad Company contested said application. That the United States district land officers at Helena, Montana, awarded to said Maria McLean the right to purchase said tract under said application. That said Northern Pacific Railroad Company

thereupon appealed to the commissioner of the general land office from the action of the register and receiver and that February 20, 1885, the commissioner of the general land office sustained the application of said Maria McLean to purchase said described land, and confirmed the decision of the local land offices at Helena, Montana. That said railroad company appealed from said decision, and said decision was affirmed by acting secretary of the interior, H. S. Muldrow, on March 28, 1887. That the decision of the secretary of the interior and of the commission of the general land office, are in words and figures following:

Department of the Interior,

General Land Office.

Washington, D. C., Feb. 20th, 1885.

Register and Receiver, Helena, Montana Ter.,

Gentlemen: I have considered the cash entry of Maria McLean, widow of Wm. McLean, No. 1134, made March 15, 1883, under sec. 2 of act of June 15, 1880 (21 Stat. 237), on the W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$, and S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, sec. 17, T. 10, N. B. three west.

Said tracts are within the withdrawal of odd-numbered sections for the benefit of the grant to the Northern Pacific Railroad Company, upon the map of the general route of said company's road filed in this office Feb. 21st, 1872, ordered by letter, from this office dated April 22, received at your office May 6th, 1872.

There are also within the forty mile (granted) limits of the definite located line of said company's road, the map of which was filed in this office, July 6, 1882.

The records show that the 'pre-emption declaratory statement covering said tracts were filed as follows:

No. 75, by A. J. Wetter, N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, with other tracts, May 13, 1868, alleging settlement same day.

No. 179, by Wm. M. Scott, S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, with other tracts October 5, 1868, alleging settlement same day, amended Oct. 20, 1869, still covering said S. $\frac{1}{4}$ N. W. $\frac{1}{4}$, and again amended Oct. 14, 1872, to No. 2807, excluding said tract.

No. 252, by Jerome S. Glick, S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, with other tracts, Nov. 27, 1868, alleging settlement the same day.

No. 776, by Robert C. Wallace, S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, with other tracts, December 13, 1869, alleging settlement the same day.

May 3, 1872, Wm. McLean made homestead entry No. 819 on said W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, and S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$.

The letter directing the withdrawal of the lands for the grant stated that the order would take effect from the date of its receipt at your office.

March 22, 1873, the secretary of the interior decided (Copp L. L., 1875, p. 377) that the withdrawal took effect upon the filing and acceptance of the map of general route.

McLean's entry having been made after the filing of such map, was held for cancellation by this office Dec. 1, 1874, subject to appeal within sixty days.

No appeal was taken from this action. Under date July 3, 1879, the local officers reported that McLean had been duly notified pursuant to office circular of Dec. 20,

1873, to show cause within thirty days why his entry should not be canceled for failure to make proof of compliance with law within the statutory period, and that he had taken no action in the matter, and recommended the cancellation of his entry. In view of the facts that the entry had been held for cancellation in 1874, and that McLean had allowed the statutory limit to expire without making proof required, and had also failed to establish his claim after due notice, said entry was canceled in this office Sept. 11, 1879, and you were so informed by letter of that date.

As shown by the certificate of the probate judge of Lewis and Clarke county, M. T., McLean died Aug. 20, 1882.

Mrs. McLean claims that her husband's entry was confirmed by section one (1) of act of April 21, 1876; that in view of said fact the cancellation of said entry was error; and that as his widow, she has the right to purchase under section 2 of the act of June 15, 1880, whereby payment of the piece of land is made equivalent to proof of compliance with the provisions of the homestead laws.

Sec. 1 of the act of April 21, 1876, provides that pre-emption and homestead entries of the public lands, made in good faith by actual settlers upon tracts of not more than one hundred and sixty acres each, within the limits of any land grant prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts, shall be confirmed and patents for the same shall be issued to the party entitled thereto

Section 2 of the act of June 15, 1880, provides that persons that have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of having so entered for homestead may have been attempted to be transferred by bona fide instrument in writing may entitle themselves to said land by paying the government price therefor with credit for the amount already paid, with a further provision that this shall in no way interfere with the rights or claims of others who may have subsequently entered said lands under the homestead laws.

Counsel for the railroad company contends that the act of 1876 confirms only such entries wherein the homestead laws have been complied with and proper proofs thereof have been made; that McLean never invoked the relief provided by said act, but allowed his claim to expire, and suffered it to be canceled, as heretofore stated, more than three years after the passage of said act, without protest; that as the land had been withdrawn by legislative enactment before the entry was made, upon cancellation of the same the land became subject to the grant and the matter had become res adjudicate and other rights had attached at the time the act of 1880 became a law; and that the right of the company is held not only under the legislative withdrawal of 1872, but also under the definite location of its road in July, 1882.

This office has already decided that upon the death of a homestead entryman the right to purchase under the act of 1880 descended to his widow. (See to R. and R. Taylor's Falls, Minn., May 21, 1883, 10 C. L. O. 90. Also that

cancellation of an entry is no bar to purchase under said act. (Ex parte Mitchell, 10 C. L. O. 36).

It may be that the pre-emption claims herein mentioned subsisting at the date of the filing the map of the general route were sufficient to except the land from the withdrawal, which it is now held took effect upon such filing, but beyond the mere fact that they were then of record there is no evidence of the validity of such claims.

The object of the act of 1876 was to afford relief to persons who without a knowledge of the withdrawal had made entries on land prior to receipt of notice of such withdrawal at the local office since, as in this case, where there was a prior legislative withdrawal, such entries could not have been perfected without such legislation. It is true the act required the proof of the compliance with the provisions of the homestead law should be made.

Upon the passage of the act of 1880, however, it became optional with a homestead entryman to make proof of such compliance or to purchase the land, and such payment is accepted in lieu of proof. (A. G. and W. U. T. Co. vs. Martin, 10 C. L. O. 329.)

McLean's homestead entry is clearly within the terms of the act of 1880, in lieu of making proof of the compliance with the provisions of the homestead laws as to residences and cultivation was not affected by the definite location of the company's road is, in my opinion, settled by the action of this office and the department in the case of O'Dillon B. Whitford against said company. In that case Whitford had a homestead entry subsisting which excepted the land from the legislative withdrawal on gen-

eral route. His entry was canceled in 1879 for failure to make proof with statutory period.

After the road had been definitely located he was allowed to purchase under the act of 1880. Dec. 1, 1883, his cash entry was considered in this office and held for approval for patent upon the ground that his homestead excepted the land from the withdrawal on general route and from the grant. This decision was affirmed by the honorable acting secretary of the interior on appeal, Jan. 7, 1885.

In the case at the bar the act of 1876 took the land out of the withdrawal on the general route, and prior to definite location of the road, the act of 1880 conferred upon the entryman a right to pay for the same in place of making proof as required prior to that time, which right, under the decision above cited, was not affected by the definite location of the road, and, upon his death, descended to his widow.

Mrs. McLean's cash entry of the land in question is accordingly held for approval for patent, subject to appeal by the railroad company within sixty days.

Notice of this action will be given the parties in interest through their resident attorneys by letters of even date herewith.

Very respectfully,

N. C. McFARLAND,

Commissioner.

Department of the Interior,

Washington, March 28th, 1887.

NORTHERN PACIFIC R. R. Co.,

vs.

MARIA McLEAN.

Entry within limits of land grant prior to notice of withdrawal.

The Commissioner of the Land Office.

Sir: William McLean made homestead entry of the W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, sec. 17, T. 10 N., R. three west, Helena, Montana, May 3, 1872. This tract is within the limits of the withdrawal of the odd-numbered sections for the benefit of the Northern Pacific Railroad Company, upon map of general route filed February 21st, 1872, the withdrawal was made February 21st, 1872, notice of which was received at the local office May 6th, 1872. It is also within the forty mile limit of said road, as fixed by the map of definite location, filed July 6, 1882.

The letter of withdrawal directed that it should take effect from the date of its receipt at the local office. Subsequently the secretary decided that said withdrawal took effect upon the filing and acceptance of the map of the general route, whereupon, on December 1st, 1873, McLean's entry was held for cancellation, subject to appeal, but no appeal was taken from said decision.

July 3, 1879, the local officers reported that McLean had been notified, pursuant to office circular of December 20, 1873, to show cause within thirty days why his entry should not be canceled for failure to make proof of compliance with the law within the statutory period, and failing to respond to such notice, his entry was canceled September 11, 1879, and no appeal was taken from that action.

McLean died the 20th day of August, 1882, and Maria McLean, his widow, on March 15, 1883, made application to purchase said tract under the act of June 15th, 1880, upon the ground that her husband's entry being confirmed by the first section of the act of April 21, 1876 (19 Stat. No. 35), that payment for the land under the act of June 15, 1880, is equivalent to proof of compliance with the provisions of the homestead laws.

Your office awarded to Mrs. McLean the right to purchase holding that under the act of June 15, 1880, it became optional with the homestead entrymen, either to make proof of the compliance with the provisions of the homestead law, or to purchase the land, and that payment for the land is accepted in lieu of such proof, from which decision the company appealed. At the date of the withdrawal this tract was covered by the following pre-emption filings:

A. J. Wetter, for the N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, with other tracts, May 13, 1868, alleging settlement same day.

Wm. M. Scott, S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, with other tracts, Oct. 5, 1868, alleging settlement same day, amended Oct. 20, 1869, still covering said S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, and again amended Oct. 14, 1872, to No. 2807 including said tract.

Jerome S. Glick, S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, with other tracts, Nov. 27, 1868, alleging settlement same day.

Robert C. Wallace, S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, with other tracts, Dec. 13, 1869, alleging settlement same day.

Prior to the act of July 14, 1870, no time had been prescribed within which pre-emptors were required to make proof and payment for their claims or unoffered lands, but that act provided that nothing in the act of March 27, 1854, "shall be construed to relieve settlers on lands reserved for railroad purposes from the obligation to file the proper notices of their claims, as in other cases, and all claimants of pre-emption right shall hereafter, when no shorter period of time is now prescribed by law, make proof and payment for the land claimed within eighteen months after the date prescribed for filing their declaratory notices shall have expired."

The act of March 3, 1871, extended the time within which proof and payment shall be made one year; and this provision has since been enforced and was subsequently incorporated in the Revised Statutes as section 2267, which provides that all claimants of pre-emption rights upon unoffered lands shall make proof and payment for the land claimed within thirty months after the date prescribed for filing their declaratory notices has expired.

It therefore appears that at the date of the withdrawal a pre-emption claim to the land in controversy was subsisting capable of being perfected, and hence this tract of land not being perfected by the withdrawal for the benefit of the road, and the homestead entry of McLean was not controlled by the act of April 21, 1876.

In the case of the Northern Pacific Railroad Company versus Burt (3 L. D. 490), the department held that the widow of an entryman had the right to purchase under the act of June 15, 1880, although the entry had been canceled for failure to make proof within the statutory period prior to the definite location of the road, and although the application to purchase was made subsequent thereto, following a long line of departmental decisions. See, also, Gilbert versus Spearing, 4 L. D. 463; Holmes versus Northern Pacific Railroad Company, 5 L. D. 333.

Applying the rule to the case at bar, Mrs. McLean should be allowed to purchase, and for this reason I affirm your decision, and herewith transmit the papers.

Very respectfully,

A. L. MULDROW,

Actg. Sec.

XXII.

That afterward, to-wit, June 17, 1887, letters patent of the United States were issued to said Maria McLean, in the usual form, describing and purporting to convey to said Maria McLean, as widow of said William McLean, deceased, the west half of northwest quarter (N. W. $\frac{1}{2}$ N. W. $\frac{1}{4}$), southeast quarter of the northwest quarter (S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$), and the southwest quarter of the northeast quarter (S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$) of sections seventeen (17), township ten (10) north, of range three (3) west, P. M. Montana. That said patent is sufficient in form and in all respects to convey, and did convey, the title to said described lands to said Maria McLean, now the defendant Maria Amacker, unless the title to said land had previously vested in the

Northern Pacific Railroad Company by virtue of said act of July 2, 1864.

XXIII.

That the said south half of the northwest quarter (S. $\frac{1}{2}$ N. W. $\frac{1}{4}$) of said section seventeen (17), township ten (10) north, of range three (3) west, the land here in controversy, was, at the commencement of this action, of the value of twenty thousand dollars (\$20,000), and is now worth over five thousand dollars (\$5,000.00). That the said defendant Maria Amickar is in possession of the premises in controversy, as grantee under the patent from the United States issued to her therefor; and that the other defendants are in possession of said premises under and by virtue of conveyances from said Maria McLean (now Maria Amickar), and that the title of all the defendants is of the same quality.

XXIV.

That after the death of said William McLean, as hereinbefore set forth, his widow, Maria McLean, married the defendant, John J. Amickar.

F. M. DUDLEY,

CULLEN & TOOLE,

Solicitors for Complainant.

T. C. BACH and

MASSENA BULLARD,

Solicitors for Defendants.

[Endorsed]: Title of Court and Cause. Agreed Statement of Facts. Filed and Entered Dec. 18, 1895. Geo. W. Sproule, Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

NORTHERN PACIFIC RAILROAD
COMPANY.

Plaintiff,

vs.

MARIA AMACKER, JOHN J. AMAC-
KER, Her Husband, GEORGE S.
HOWELL, GEORGE GOTTHARDT,
WALTER H. LITTLE, ALEXAN-
DER J. STEELE, FRANK H.
TINGS, JOHN BLANK, JOSEPH
JORDAN, HERBERT B. REED, and
GEORGE DIBERT,

Defendants.

Findings of Fact and Conclusions of Law.

Be it remembered that this cause came on regularly for trial on the 19th day of December, 1895, before the court sitting without a jury, a trial by jury having been expressly waived by the parties thereto before the trial was commenced and the said cause having been submitted upon an agreed statement of facts, which said agreed statement is in writing and embraced in the stipulation between the

parties on file herein, and having been argued by counsel for both plaintiff and the defendants the same was by the court taken under advisement, and now upon this 3rd day of March, 1897, one of the days of the November term of said court, the court finding the facts herein as set forth in said agreed statement and stipulation, and as conclusion of law from said facts finds that the plaintiff is not and was not at any of the times mentioned in the complaint the owner of or entitled to the possession of the south half of the northwest quarter of section seventeen (17), in township ten (10) north, of range three (3) west, of the principal meridian of Montana, or any part thereof and that the defendants are entitled to the possession of said lands, and that the defendants are accordingly entitled to judgment and costs herein.

Dated March the 3rd, 1897.

HIRAM KNOWLES,
Judge.

[Endorsed]: Title of Court and Cause. Finding of Facts and Conclusion of Law. Filed March 3, 1897. Geo. W. Sproule, Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

NORTHERN PACIFIC RAILROAD
COMPANY.

Plaintiff,

vs.

MARIA AMACKER, JOHN J. AMAC-
KER, Her Husband, GEORGE S.
HOWELL, GEORGE GOTTHARDT,
WALTER H. LITTLE, ALEXAN-
DER J. STEELE, FRANK H.
TINGS, JOHN BLANK, JOSEPH
JORDAN, HERBERT B. REED, and
GEORGE DIBERT,

Defendants.

Judgment.

This cause came on regularly for trial on the 19th day of December, 1895, F. M. Dudley, Esq., and Messrs. Cullen and Toole appeared as counsel for plaintiff and Thomas C. Bach, Esq., and Massena Bullard, Esq., appeared as counsel for defendants. A trial by jury having been expressly waived by the counsel for the respective parties the cause was tried before the court sitting without a jury, whereupon, by written stipulation of the parties, the said

cause was submitted to the court for consideration and decision upon an agreed statement of facts, which stipulation embracing said facts is on file in said action, and after due deliberation thereon the court delivers its findings and decision in writing which is filed and ordered that judgment be entered in accordance therewith:

Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged that the Northern Pacific Railroad Company, the plaintiff, take nothing herein, and that the defendants Maria Amicker, John J. Amicker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, and Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed, and George Diibert do have and recover of and from the Northern Pacific Railroad Company, the plaintiff, the said defendant's costs and disbursements incurred in this action, amounting to the sum of _____, dollars.

Judgment entered March 3rd, 1897.

GEORGE W. SPROULE,

Clerk.

Attest a true copy:

[Seal] GEO. W. SPROULE,

Clerk.

[Endorsed]: Title of Court and Cause. Judgment.
Filed and Entered March 3rd, 1897. Geo. W. Sproule,
Clerk.

*In the Circuit Court of the United States, Ninth Judicial
Circuit, in and for the District of Montana.*

NORTHERN PACIFIC RAILROAD
COMPANY,

versus

MARIA AMICKER, et al.

No. 140.

Clerk's Certificate to Judgment Roll.

George W. Sproule, clerk of the circuit court of the United States, for the Ninth Judicial Circuit, District of Montana, do hereby certify that foregoing papers heretofore annexed constitute the judgment roll in the above entitled action.

Attest my hand and the seal of said circuit court this 3rd day of March, 1897.

[Seal]

GEO. W. SPROULE,

Clerk.

[Endorsed]: Title of Court and Cause. Judgment Roll.
Filed and Entered March 3rd, 1897.

And thereafter, to-wit, on the 15th day of June, 1897, the plaintiff herein filed its assignment of errors herein which said assignment of errors, is in the words and figures as follows, to-wit:

*In the United States Circuit Court, for the District of
Montana.*

NORTHERN PACIFIC RAILROAD
COMPANY.

Complainant,

vs.

MARIA AMACKER, JOHN J. AMAC-
KER, Her Husband, GEORGE S.
HOWELL, GEORGE GOTTHARDT,
WALTER H. LITTLE, ALEXAN-
DER J. STEELE, FRANK H.
PINGS, JOHN BLANK, JOSEPH
JORDAN, HERBERT B. REED, and
GEORGE DIBERT,

Defendants. }

Assignment of Errors.

Comes now the above-named complainant and assigns error on the record in the above-entitled case as follows, to-wit:

I.

The court failed to hold that the land described in the complaint was reserved for the benefit of the Northern Pacific Railroad Company from and after February 21, 1872.

II.

The court failed to hold that the lands in controversy

were public lands, not reserved, sold, granted, or otherwise appropriated, and were free from pre-emption or other rights at the date that the said Northern Pacific Railroad coterminous with said lands was definitely fixed by the filing of a plat thereof in the office of the commissioner of the general land office.

III.

The judgment entered is not supported by the facts found.

IV.

The entry of judgment for the defendants and against the plaintiff.

Wherefore, plaintiff prays that the judgment rendered in this cause may be reversed and set aside, and held for naught.

WM. WALLACE, JR.,
F. M. DUDLEY,
Attorneys for Plaintiff.

[Endorsed]: Title of Court and Cause. Assignment of Errors. Filed June 15, 1897. Geo. W. Sproule, Clerk.

And on said 15th day of June, 1897, the petition of said Northern Pacific Railroad Company, plaintiff, for a writ of error was duly filed herein in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

NORTHERN PACIFIC RAILROAD
COMPANY.

Plaintiff,

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband, GEORGE S. HOWELL, GEORGE GOTTHARDT, WALTER H. LITTLE, ALEXANDER J. STEELE, FRANK H. PINGS, JOHN BLANK, JOSEPH JORDAN, HERBERT B. REED, and GEORGE DIBERT,

Defendants.

Petition for Writ of Error.

And now comes the Northern Pacific Railroad Company, plaintiff herein, and says that on the 3rd day of March, 1897, this court entered judgment herein in favor of the defendants and against this plaintiff in which judgment and the proceedings had thereunto in this cause, certain

errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

F. M. DUDLEY and
WM. WALLACE, JR.,
Attorneys for the Plaintiff.

Let the writ of error issue as herein prayed.

Dated June 15, 1897.

HIRAM KNOWLES,
U. S. District Judge.

[Endorsed]: Title of Court and Cause. Petition for Writ of Error and Order. Filed and Entered June 15, 1897. Geo. W. Sproule, Clerk.

And on said 15th day of June, 1897, the bond on writ of error was duly approved and filed, which said bond is in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

NORTHERN PACIFIC RAILROAD
COMPANY.

Plaintiff.

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband, GEORGE S. HOWELL, GEORGE GOTTHARDT, WALTER H. LITTLE, ALEXANDER J. STEELE, FRANK H. PINGS, JOHN BLANK, JOSEPH JORDAN, HERBERT B. REED, and GEORGE DIBERT,

Defendants.

Bond on Writ of Error.

Know all Men by These Presents, that we, Northern Pacific Railroad Company, as principal and E. W. Williams, and A. D. Edgar, as sureties, are held and firmly bound unto the above named defendants in the sum of \$300.00, three hundred dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, ad-

ministrators, and assigns, and each and every of them jointly and severally firmly by these presents.

Sealed with our seals and dated this 15th day of June, 1897.

Whereas, the above named plaintiff, Northern Pacific Railroad Company, has sued out a writ of error in the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in the above entitled action on the 3rd day of March, A. D. 1897.

Now, therefore, the condition of this obligation is such that if the above named plaintiff, Northern Pacific Railroad Company, shall prosecute said writ of error to effect and answer all damages and costs, if it fails to make said writ of error good, then this obligation to be void, otherwise the same shall be and remain in full force, virtue and effect.

NORTHERN PACIFIC RAILROAD COMPANY,

By WM. WALLACE, JR.,

Its Agent and Atty.

A. D. EDGAR, [Seal]

E. W. WILLIAMS. [Seal]

United States of America, }
District of Montana. } ss.

E. W. Williams and A. D. Edgar, being duly sworn, each for himself deposes and says, that he is a resident of the state of Montana; and one of the sureties to the foregoing bond, that he is worth the sum specified therein as the penalty thereof over and above his just debts and liabilities and property by law exempt from execution.

A. D. EDGAR,
E. W. WILLIAMS.

Subscribed and sworn to before me this 15th day of June, 1897.

HARRY YEAGER,
Notary Public Lewis and Clarke County, State of Montana.

I hereby approve the within bond and sureties.

HIRAM KNOWLES,
Judge.

[Endorsed]: Title of Court and Cause. Bond. Filed.
June 15, 1897. Geo. W. Sproule, Clerk.

And on said day a writ of error and citation were duly issued, served and filed which are hereto annexed:

Citation.

UNITED STATES OF AMERICA, ss.

To Maria Amacker, J. J. Amacker (her husband), G. S. Howell, G. Gotthart, W. H. Little, A. J. Steele, F. H. Ringe, J. Blank, J. Jordan, H. B. Reed and Geo. Dibert, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco and the State of California, on the 13th day of July, 1897, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the Ninth Circuit of the United States for the District of Montana, wherein Northern Pacific Railroad Company is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the said judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable HIRAM KNOWLES, judge of the District Court, of the United States, District of Montana, this 15th day of June, A. D. 1897, and of the Independence of the United States the one hundred and twentieth.

HIRAM KNOWLES,

Judge.

Service of the above citation is hereby admitted and receipt of copy acknowledged this 15th day of June, 1897.

MASSENA BULLARD,

Attorney for Defendants and Defendants in Error.

[Endorsed]: Citation. Filed June 15, 1897. Geo. W. Sproule, Clerk.

Writ of Error.

UNITED STATES OF AMERICA, ss.

The President of the United States of America to the Judges of the Circuit Court of the United States, Ninth Circuit, District of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the said Circuit Court, before you, between Northern Pacific Railroad Company, plaintiff, and Maria Amacker, J. J. Amacker (her husband), G. S. Howell, G. Gotthart, W. H. Little, A. J. Steele, F. H. Ringe, J. Blank, J. Jordan, H. B. Reed and Geo Dibert, defendants, a manifest error hath happened, to the great damage of the said plaintiff, and plaintiff in error, Northern Pacific Railroad Company, as by its complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all

things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California on the 13th day of July, 1897, next, in the said United States Circuit Court of Appeals for the Ninth Circuit, to be then and there held; that, the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit, may cause to be done therein to correct that error, what of right, according to the law and custom of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 15th day of June, in the year of our Lord, one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twentieth.

Attest:

GEO. W. SPROULE,

Clerk.

The above writ of error is hereby allowed.

HIRAM KNOWLES,

Judge.

Service of the above writ of error is hereby admitted and receipt of copy acknowledged this 15th day of June, 1897.

MASSENA BULLARD,

Attorney for Defendants and Defendants in Error.

[Endorsed]: Writ of Error. Filed June 15, 1897. Geo. W. Sproule, Clerk.

Return to Writ of Error.

The answer of the judges of the Circuit Court of the United States for the District of Montana, to the foregoing writ:

The records and proceedings whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court.

[Seal]

GEO. W. SPROULE,
Clerk.

Clerk's Certificate to Transcript.

United States of America, }
District of Montana. } ss.

I, George W. Sproule, clerk of the United States Circuit Court, Ninth Circuit, District of Montana, do hereby certify that the foregoing volume, consisting of 52 pages, numbered consecutively from 1 to 52 inclusive, is a true and correct and complete transcript of the pleadings, process, orders, judgment, and all proceedings had in said cause and of the whole thereof as appears from the orig-

inal files and records in said cause in said court, and I further certify that I have annexed to and included within said paging the original writ of error and citation, together with the proof of service thereof.

I further certify that the cost of said transcript is the sum of \$16.10, and that the same has been paid by plaintiff in error.

In witness whereof I have hereunto set my hand and affixed the seal of said U. S. Circuit Court at Helena, in said District of Montana, this 5th day of July, A. D. 1897.

[Seal]

GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 386. United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Railroad Company, Plaintiff in Error, v. Maria Amacker, J. J. Amacker (her husband), G. S. Howell, G. Gotthart, W. H. Little, A. J. Steele, F. H. Ringe, J. Blank, J. Jordan, H. B. Reed and Geo. Dibert, Defendants in Error. Transcript of Record. Error to the United States Circuit Court for the District of Montana.

Filed July 10, 1897.

F. D. MONCKTON,
Clerk.